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Supreme Court, U.S.
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No. 07-144

IN THE

Supreme Court of the United States

JEANNETTE A. BISNO AND ROBERT H. BISNO, INDIVIDUALLY; AND DOES 1 THROUGH 25, INCLUSIVE, PETITIONERS

v.

NORTH BEVERLY PARK HOMEOWNERS ASSOCIATION, INC., A CALIFORNIA NON-PROFIT CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A state trial court judge, after a non-jury trial, issued a permanent injunction that was appealed on an interlocutory basis through a state's appellate system. Upon remittitur and before entry of any final judgment, the civil litigant aggrieved by the injunction learned that the trial judge was under state charges for removal from the bench on the ground of mental incompetence for which there was some evidence this condition had arisen prior to conclusion of the original bench trial. The questions presented are:

1. Whether a party to a civil non-jury trial is entitled under the Due Process Clause of the Fourteenth Amendment to a mentally competent judicial officer, and if so, whether the contours of federal due process require, at a minimum, an appropriate mechanism for determining when mental disease may have impaired such judicial officer.

2. Whether a party aggrieved by a court order likely tainted by mental incapacity of a judicial officer, is entitled to an opportunity to seek evidence to establish the time of the onset of the mental disease, and, if so, what type of discovery process protects and balances the due process rights of the civil litigant with the privacy rights of the judicial officer and his or her family.

3. Whether the order below, on a second interlocutory appeal over the disputed injunction order, is final for the purposes of review under 28 U.S.C. § 1257(a).

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OPINIONS BELOW

The order of the California Supreme Court (App., *infra*, 34a)[1] denying the petition for review and request for de-publication of the opinion of the court of appeal is reported at 2007 Cal. LEXIS 5153. The opinion of the California Court of Appeal disposing of the second interlocutory appeal (App., *infra*, 1a-31a) is reported at 147 Cal. App. 4th 762; 54 Cal. Rptr. 3d 644; 2007 Cal. App. LEXIS 187. The opinion of the California Superior Court for Los Angeles County (App., *infra*, 32a-33a) denying dissolution of the permanent injunction and request for limited discovery regarding the mental incapacity of the trial judge is unreported.

JURISDICTION

The judgment of the Court of Appeal of California, Second Appellate District, was entered on February 13, 2007. The Court of Appeal denied a timely petition for rehearing on March 2, 2007. On May 16, 2007, the Supreme Court of California denied a petition for review and a request to de-publish the opinion of the Court of Appeal. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides in relevant part:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

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[1] The Appendix to this Petition will be cited hereinafter as "(App., *infra*, __a)."

STATEMENT

This case raises important issues regarding the scope of the constitutional due process right to a fair tribunal: whether a judge sitting as the trier of fact must be mentally competent and what discovery is available to a litigant to show that his or her judge was, in fact, not. Furthermore, as the facts in this case illustrate, sometimes trial and appellate courts are loathe to sufficiently protect the constitutional right to a fair tribunal when to do so requires retrial or other significant unwinding of the court proceedings to properly correct the defect triggered by the mental incapacity of a judicial officer. However, the precedents of this Court establish that due process is best protected when any question of unfairness is removed by retrial or reconsideration of decisions made by judicial officers that may have been tainted by unfairness. That is precisely what would cure the infirmities of what happened in the courts below in this case.

Appellants, Jeanette and Robert Bisno ("the Bisnos") purchased a lot and constructed a single-family home in a planned gated community of multi-million dollar homes located in the City of Beverly Hills, California known as "North Beverly Park." (Appellant's Appendix at p. 410.)[2] Respondent, North Beverly Park Homeowners Association ("the Association"), filed an action against the Bisnos for damages and injunction asserting that the Bisnos were threatening to install an abstract sculpture and gates for their motor court without approval from the Association under the Declaration of Covenants, Conditions and Restrictions of the community. (A.A. at pp. 1-163.)

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[2] Hereinafter citations to the Appellant's Appendix containing the appellate record before the California Court of Appeal shall be "(A.A. at p. ____)."

A. Original Trial Court Injunction and Appeal

The case was assigned to Hon. Rodney E. Nelson, a Los Angeles County Superior Court Judge, sitting in Department 46. (A.A. at p. 400.) Initially, on June 11, 2002, Judge Nelson granted a preliminary injunction barring construction of the sculpture and gates. (A.A. at pp. 389-391.) Then, a year later, on October 31, 2003, in response to Bisnos' motion to dissolve the preliminary injunction, Judge Nelson changed his mind and lifted the preliminary injunction, allowing the Bisnos to install the sculpture and gates subject to final decision at trial. (A.A. at p. 392.) Then, after a trial conducted in March/April 2004, Judge Nelson issued a statement of intended decision that expressly apologized to the Bisnos and their counsel and changed his mind again to impose a permanent injunction. (A.A. at pp. 394-397.) On April 29, 2004, Judge Nelson issued the order granting the permanent injunction against the Bisnos that required them to remove the sculpture and motor court gates and to obtain Association permission for any new installation. (A.A. at pp 400-404.)

The Bisnos prosecuted an interlocutory appeal of the grant of the permanent injunction through the California appellate system. (A.A. at p. 412.) Ultimately, the California Supreme Court denied review of the Court of Appeal's affirmance of the trial court injunction order and the remittitur was issued on October 13, 2005. (A.A. at pp. 439, 440.)

B. Motion Judge's Refusal to Dissolve Injunction

As the interlocutory appeal was returning to the trial court, on October 17, 2005, the Bisnos' counsel, as a result of a lunch conversation with another attorney at a law seminar, first learned that Judge Nelson, while still the assigned judge

of Department 46, had been placed on administrative leave on suspicion that he suffered a degenerative brain disease which impaired his mental capacity. (A.A. at pp. 442, 457, 458; Reporter's Transcript at p. 9.)[3] The Bisnos' counsel's later investigation showed that over 50 cases of Judge Nelson were under reassignment or reconsideration due to the length of time the Judge may have been incapacitated by disease and continued to serve on the bench. (A.A. at p. 603, R.T. at p. 11.)

California has a judicial disqualification statute that requires a judge to step aside if ". . . by reason of permanent or temporary physical impairment, the judge is unable to properly perceive the evidence or is unable to properly conduct the proceeding. . ." California Code of Civil Procedure § 170.1(a)(7) or ". . . if the judge believes his or her recusal would further the interests of justice . . . ." California Code of Civil Procedure § 170.1(a)(6)(A).

Further investigation by the Bisnos' counsel revealed other cases in Department 46 that had statements of disqualification filed against Judge Nelson under section 170.1(a)(7) of the Code of Civil Procedure. (A.A. at pp. 515-609.) On November 30, 2005, before any entry of a formal final judgment, the Bisnos filed a statement of disqualification in this case that alleged that Judge Nelson suffered from lack of memory and concentration when he sat as trier of fact the previous year at the bench trial. (A.A. at 441-445.) On the basis of the allegations contained in the statement of disqualification, the Bisnos also filed a motion to dissolve the injunction granted by Judge Nelson. (A.A. at 446-464.)

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[3] Hereinafter citations to the Reporter's Transcript of Motion Judge Hearing, dated January 26, 2006, shall be "(R.T. at p. ___)."

A few weeks later, on December 16, 2005 counsel in another Department 46 case, *Harris v. Investor's Business Daily, Inc.*, Case No. BC 269313, filed a similar statement of disqualification in which counsel set forth citations of incidents that supported his allegation that Judge Nelson was suffering from mental impairment since the beginning of 2004. (A.A. at pp. 586-592.) This was evidence that at the same time as the bench trial and order of injunction was issued in the Bisnos' case other attorneys with cases in Department 46 had observed odd behavior by Judge Nelson that suggested mental capacity problems. (A.A. at pp. 515-579, 524-535, 587-591.) Bisnos' counsel filed a supplement to the Motion to Dissolve the Injunction by offering the *Harris* statement of disqualification and others as evidence that Judge Nelson was likely mentally incapacitated at the time of trial and issuance of the injunction. (A.A. at pp. 580-609; *see especially* pp. 586-590 for details of odd behavior of Judge Nelson all during 2004.)

The Bisnos personally served a copy of the statement of disqualification in their case on Judge Nelson at his home where he was on administrative leave and upon Judge Nelson's legal counsel who was defending him in proceedings before the California Commission on Judicial Performance to remove him from the bench. (A.A. at pp. 494, 521, 576-577.) Neither Judge Nelson nor his counsel responded in any way to the Bisnos' statement of disqualification. (A.A. at p. 521.) Under the California judicial disqualification statute, the failure of the judge to respond or defend a statement of disqualification results in the allegations contained therein being deemed true. California Code of Civil Procedure §170.3(c)(4); *Urias v. Harris Farms, Inc.*, 234 Cal.App.3d 415, 421-422 (1991). To the best knowledge of the parties, Judge Nelson did not respond to any of the statements of disqualification filed against him in his Department 46 cases.

In the *Harris v. Investor's Business Daily* case, the Los Angeles Superior Court routinely reassigned the case to a new trial judge while awaiting an interlocutory appeal in that case to be remitted from the Court of Appeal. In the Bisnos' case, the Los Angeles County Superior Court assigned a new judge who heard and decided the pending motion to dissolve the injunction, supporting requests for judicial notice, and a pending motion by the Association for attorneys' fees.

Bisnos' Motion to Dissolve the Injunction was based upon the failure of Judge Nelson to file a response and several requests to take judicial notice of the existence of the Commission on Judicial Performance proceedings against Judge Nelson on the ground of degenerative brain disease (Alzheimer's) and statement of disqualification filings in other cases before Judge Nelson. (A.A. at pp. 446-447.)

The new judge, referred to as the "Motion Judge" in the Court of Appeal opinion below, refused to hold the allegations of mental incapacity at the time of trial to be deemed admitted as a result of Judge Nelson's failure to respond, and refused to grant judicial notice of the stated reasons in public notification of the proceedings of the Commission on Judicial Performance to remove Judge Nelson for degenerative brain disease, or the content of other statements of disqualification proffered from other cases in Department 46. (R.T. at pp. 3-6, 8, 19-20.) On this basis, the Motion Judge concluded there was no admissible evidence establishing that Judge Nelson was mentally incompetent at the time of trial.

Although requested in the notice of the Motion to Dissolve the Injunction and during oral argument, the Motion Judge also denied requests of the Bisnos' counsel to allow limited discovery of the judge's family members and his medical care provider to determine when the mental disease was diagnosed or manifested. (A.A. at p. 455; R.T. at pp. 9,

20.) After refusing to admit most of the proffered evidence and denying any right of limited discovery to obtain more evidence, the Motion Judge concluded there was no admissible evidence before him that Judge Nelson was mentally incompetent at the time of trial, and despite specific assertions of the Bisnos' counsel that a denial of a limited discovery right would deny the Bisnos due process of law, the Motion Judge denied the Motion to Dissolve the Injunction. (R.T. at pp. 3-6, 8, 19-20.)

In denying the motion, the Motion Judge indicated he was loath to weigh the request to take discovery against the privacy rights of the judge and family:

> "Motion is denied in every respect. There's no precedent for the type of motion we have here. There's no evidence in any support, no admissible evidence in support of the motion, and there's no precedent nor support for the request to take discovery. It's not raised. Certainly sounds like it would be a violation of privacy rights. A whole can of worms we don't even have to open." (R.T. at p. 20.)

Thereafter, the Motion Judge ruled on other pending matters in the case and the hearing concluded. (R.T. at p. 22-23.)

C. Court of Appeal Oral Argument and Opinion

The Bisnos timely prosecuted a second interlocutory appeal of the trial court's refusal to dissolve the injunction. In briefing the case for the California Court of Appeal, Second Appellate District, neither of the parties addressed the issue of whether the prior issuance of the permanent injunction was a final judgment in the case. (Appellants'

Petition for Rehearing at p. 5.)[4] At oral argument before the Court of Appeal, the issue of whether the permanent injunction was a final judgment was raised for the first time by that court. (App.Pet.Reh. at p. 5.) Bisnos' counsel pointed out that neither of the parties had briefed the issue because both appeals in the case had been prosecuted under California's appellate statute that provides for interlocutory appeal of an order "granting or dissolving an injunction, or refusing to grant or dissolve an injunction" (California Code of Civil Procedure § 904.1(a)(6)). (App.Pet.Reh. at p. 5.)

On February 15, 2007, the Court of Appeal filed and published its decision, *North Beverly Park Homeowners Assoc. v. Bisno*, 147 Cal.App.4th 762, 765 (2007). Despite the lack of a final judgment ever having been entered in the trial court, the Court of Appeal characterized the Bisnos' filing upon first learning about Judge Nelson's condition as an effort "to avoid the permanent injunction by filing a statement of disqualification against the trial judge . . . ." (App., *infra* 3a.) The Court of Appeal opinion distinguished California case law on the basis of whether a statement of disqualification is filed before or after final judgment, and because the statutory scheme provides for no procedure after final judgment, the Court concluded that the Legislature never intended the judicial disqualification statute to apply following final judgment. (App., *infra* 7a, 11a.) Based upon its declaration that the entry of the permanent injunction was apparently a final judgment, the Court of Appeal concluded that the disqualification statute could not be invoked and the failure of Judge Nelson to respond was not evidence of his mental incapacity at the time of the non-jury trial. (App., *infra* 11a.)

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[4] Hereinafter citations to Appellant's Petition for Rehearing shall be "(App.Pet.Reh. at p. ____)."

The Court of Appeal also reviewed the requests for judicial notice of the public notifications of the proceedings of the Commission on Judicial Performance and the statements of disqualification filed in other cases in Department 46. (App., *infra* 20a-22a.) After affirming the Motion Judge's decision to not grant judicial notice of the content of those evidentiary submittals, the Court of Appeal addressed the issue of whether a litigant has a right to conduct discovery regarding when a judge may have exhibited signs of mental impairment or was diagnosed with such impairment. (App., *infra* 27a-28a.) The Court of Appeal stated its standard for obtaining a right to conduct such discovery as follows:

> "It bears repeating that even if we assume the remedy of dissolving the permanent injunction subject to a final judgment is available on the basis of the trial judge's mental infirmity, **the Bisnos have made no showing to reasonably suggest that such infirmity infected the issuance of the permanent injunction in their case.** (App., *infra* 28a, bold emphasis added.)

Accordingly, the Court of Appeal affirmed the Motion Judge's decision. (App., *infra* 28a.)

D. Petition for Rehearing to Court of Appeal

The Bisnos timely filed a petition for rehearing and request to augment the record before the Court of Appeal. In the petition for rehearing, the Bisnos pointed out that neither party in this case had ever understood the return of the interlocutory appeal to the trial court to be a final judgment. (App.Pet.Reh. at pp. 1, 3-5, 6-7.) In support of this contention, Bisnos asked the Court of Appeal to grant a request to augment the record with Judge Nelson's minute

order entered June 30, 2004 after grant of the permanent injunction and notice of the interlocutory appeal was filed. (App.Pet.Reh. at pp. 1-2.) That order stayed trial of the cross-complaint until the results of the pending appeal returned to the trial court. (App.Pet.Reh. at p. 4.)

The Bisnos argued that the existence of this minute order and the lack of any entry of final judgment in the case formed the reasonable basis of the Bisnos filing a statement of disqualification against Ju lge Nelson under the judicial disqualification statute prior to entry of such final judgment. (App.Pet.Reh. at pp. 6-9.) The Bisnos requested rehearing on the ground that the Court of Appeal's assumption that there was a final judgment would constitute an injustice as the opinion significantly relied on this erroneous factual assumption. (App.Pet.Reh. at pp. 6-9.)

Additionally, the petition for rehearing specifically pointed out that the standard articulated by the Court of Appeal for a litigant to obtain a right of discovery of when a judge's mental infirmity first appeared was an impossible barrier that denied them due process of law as well. (App.Pet.Reh. at pp. 9-12.) The Bisnos contended that requiring a litigant to make a showing that a judge's mental infirmity tainted a prior decision so as to be granted the right of discovery to seek evidence to establish that the mental infirmity tainted the prior decision was a Catch -22 impossibility. (App.Pet.Reh. at pp. 2, 9-12.)

On March 2, 2007, the Court of Appeal denied both the petition for rehearing and the motion to augment the record with the minute order of Judge Nelson staying the remainder of the case until after prosecution of the interlocutory appeal.

E. California Supreme Court Proceedings

The Bisnos timely filed a petition for review with the California Supreme Court. Additionally, the Bisnos filed a request that the California Supreme Court de-publish the Court of Appeal opinion. On May 16, 2007, the California Supreme Court denied both the petition for review and request to de-publish leaving the Court of Appeal decision as the decision of the highest court of the State of California. (App., *infra* 34a.)

F. Stay of the Remittitur

The Bisnos timely filed with the Court of Appeal a motion to stay the remittitur. On May 25, 2007, the Court of Appeal granted the motion to stay the remittitur until August 6, 2007 and ruled that if a petition for certiorari was filed with the United States Supreme Court by that day, the issuance of the remittitur would be stayed until this Court disposes of the case. (App., *infra* 35a-36a.)

REASONS FOR GRANTING THE PETITION

The decision below offers an appropriate record and opportunity for the Court to clarify minimal constitutional due process that is owed to civil litigants regarding the mental competency of a judicial officer. The decision below currently stands as published precedent authorizing states to maintain judicial systems that fail to remedy fundamental unfairness and only this Court's action can point states in a more balanced direction.

The issue is of fundamental national importance to the integrity and credibility of our judicial system. Litigants whose cases are decided by mentally incompetent judges have not received justice, but rather are inflicted with judicial decisions that could have just as easily been made by the toss

of a dart, roll of a die, or the barbaric chance of a pistol duel. Constitutional due process ought at a minimum assure the integrity of our judicial system by promptly correcting even the appearance that decisions made by a diseased mind have been left standing. This Court is empowered to suggest the proper incentives and mechanisms to encourage early retirement and medical care for affected judicial officers, enable prompt removal of mentally incapacitated judges to avoid further disruption of the legal system, and correct the fundamental injustice of decisions initially made by a diseased mind. Allowing potentially mentally impaired judges' decisions to stand when no significant reliance or shift in positions of the parties has occurred, as this case demonstrates, is not in the national interest of maintaining the integrity and credibility of the judicial system.

There is some general evidence that dementia is a rising serious problem among members of the judiciary. The impact of Alzheimer's disease and related dementia is not easily quantified for those sitting on the bench, however, it is reasonable to assume that the impact on the judiciary at least will track the projections that dementia is rising dramatically in the general population.[5] A body of scientific literature reports that rising cases of obesity, which are linked to the plaque that deposits on brain structures impeding thought processes and memory may substantially increase the early onset of Alzheimer's disease and other dementia.[6] As a

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[5] *See, e.g.*, Alzheimer's Ass'n., *Alzheimer's Disease Facts and Figures* (2007), available at http://www.alz.org/national/documents/Report_2007FactsAndFigures.pdf .

[6] See, e.g., Thomas Jefferson Univ. Hospital, *Scientists Discover Mechanism Tying Obesity to Alzheimer's Disease* (Dec. 30, 2005), available at http://www.sciencedaily.com/releases/2005/12/051230084818.htm.

profession notoriously more sedentary than that of the general population, the judiciary may be especially at risk for an increasing incidence of dementia as a result of rising obesity.[7]

Irrespective of the basis for the increased incidence of dementia in the American population, the decision below represents an unfortunate national trend that statistics suggest will grow worse and guidance from this Court is now needed.

There has been and remains a great taboo in the judiciary against dealing with or acknowledging the existence of dementia and seeking solutions to avoid negative impacts on the justice system and the lives of litigants.[8] This Court may be the only institution that can authoritatively speak to the nation on such a sensitive subject, break down the judicial taboos of discussing it, and give it the urgency it deserves. The Geriatric Education Center of Michigan (GECM) has noted that one of the greatest barriers to diagnosis of dementia-related disease is the patient's own denial of a problem until the disease has reached a level of significant impairment.[9] In educational materials prepared with federal

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[7] JoAnn E. Manson, et al., *The Escalating Pandemics of Obesity and Sedentary Lifestyles*, Arch Intern Med. 2004, 164:249-258 (2004), available at http://archinte.ama-assn.org/cgi/content/abstract/164/3/249.

[8] Judge Kozinski in his concurring opinion in *United States v. State of Washington*, 98 F.3d 1159, 1166 noted that "[w]e have come a long way from the day when discussion of a judge's mental state was considered a breach of decorum." He cited this Court's opinion in *Slayton v. Smith*, 404 U.S. 53, 54, 92 S.Ct. 174, 174, 30 L. Ed.2d 209 (1971) in which this Court chastised the court of appeals for mentioning 'so delicate a subject' as a judge's mental condition in a published decision.

[9] Geriatric Education Center of Michigan, *Dementia in Primary Care Training Materials* (Rev. 02-28-07), available at http://www.dementiacoalition.org/professionals/pdfs/dementia_in_primary_care.pdf at page 2. See also, *United States v. State of Washington*, 98

grant funds from the Bureau of Health Professions of the Health Resources and Services Administration, GECM reported that patient and family denial of dementia inflicts harm on the patient (judicial officer) by delaying early drug intervention which might slow disease progression and the situation "can go on for months and years, as the problem only continues to worsen."[10] Ignoring the problem or fearing to confront it, as the California appellate courts have done in this case, misses an opportunity to clarify the constitutional parameters and offer solutions that are also in the good health interest of mentally impaired judicial officers to get early treatment. Judicial officers who have given tremendous public service deserve prompt life-extending treatment for dementia and the current legal framework reinforces deadly silence.

The record below demonstrates a California Superior Court Judge appears to have been impaired for about 1 ½ years before he had to be forced from the bench by the institution of formal proceedings by the California Commission on Judicial Performance. During that period, he decided countless motions, petitions, and presided over at least one non-jury trial – the trial result contested in this case. There was evidence that over 50 cases of the judge had to be reassigned and some decisions overturned. (R.T. at p. 11.)

This Court has never expressly held what most courts in the United States presume would be this Court's holding: that constitutional due process requires an impartial and mentally competent judicial officer. However, of even more national urgency is the need for guidance regarding the limits

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F.3d 1159, 1166 (9th Cir. 1996)(citing a New York Times article that reports people with Alzheimer's disease have a strong tendency to deny their condition).

[10] *Ibid.* at p. 6.

of this right that is presumed by most courts of this nation to exist. These limits might be identified by the following questions:

- Can an aggrieved litigant seeking to establish when a judge's alleged mental disability commenced obtain any discovery from the judge's medical provider?

- To avoid intrusion into the privacy of the judge's family life, can the court itself be required, as part of the due process right, to disclose to a litigant the name of the judge's medical provider and insurer so that discovery can proceed without upsetting the jurist's family and in the furtherance of the court's duty to do justice?

- Should the mere commencement of proceedings to remove a judge from the bench on the ground of mental incapacity sufficiently establish an orderly right to obtain medical records to identify what cases and decisions may or may not have been affected by the onset of degenerative brain disease?

- Should any right to discovery be limited to cases where the mental infirmity manifests itself prior to entry of a final judgment?

- Are there any circumstances after final judgment where the interests in finality and the end of litigation cut off the right to discover possible mental impairment that may have tainted a decision or judgment?

- Although this case does not involve a federal judge, has Congress, by establishing judicial councils and not providing a statutory right to challenge directly a

federal judge on the ground of mental incapacity struck the proper balance between Article III independence while assuring the federal judiciary's mental competence? Since state judges do not have Article III independence, does due process require mental competence for them and allow greater flexibility for the states to allow direct disqualification on mental capacity grounds?

Only this Court can bring some clarity to the due process implications of this societal trend that is statistically destined to have a growing impact on the judicial system of this nation.

I. The Decision Below Reflects Widespread Confusion And A Judicial Taboo Regarding How To Balance A Litigant's Due Process Right To A Mentally Competent Judicial Officer With Considerations Of Privacy Of The Officer And His Or Her Family

A. Fundamental Due Process Requires A Judicial Officer Who Is Impartial And Mentally Competent

The due process clause of the Fourteenth Amendment requires a "fair trial in a fair tribunal." *Witkin v. Larkin*, 421 U.S. 35, 46 (1975). It is well-established by this Court that litigants are entitled to have factual determinations made by persons who are mentally competent. Almost a century ago, in *Jordan v. Commonwealth of Massachusetts*, 225 U.S. 167, 176 (1912), this Court set the minimum standard in a case that questioned the competency of a juror: "Due process implies a tribunal both impartial and mentally competent to afford a hearing."

California Supreme Court and Court of Appeal rulings on this fundamental principle of federal due process are, of course, in accord. *See, People v. Millwee*, 18 Cal. 4th 96, 144 (1998); *Alta Church v. Capital Freight Lines*, 141 Cal.App.2d 246, 248 (1956). In *Alta Church*, the California Court of Appeal was certain that the right to a mentally competent juror was as fundamental as the right to an unbiased juror:

> "Although we have been referred to no cases in this state directly in point, surely there can be no question but that the right to a trial before mentally competent jurors is as fundamental as the right to trial before unbiased and unprejudiced jurors which our courts have held to be an 'inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution.'" *Id.* at p. 248 *citing People v. Galloway*, 202 Cal. 81, 92 (1927).

This Court has robust case law in the area of due process requirements for an impartial judicial officer free of bias or special interest in the outcome of a case. See, e.g., *Tumey v. Ohio*, 273 U.S. 510, 522 (1927)(due process violated when judge will earn revenue for village if defendant convicted); *In re Murchison*, 349 U.S. 133, 136 (1955)(no judge can try his own case or any case in which he has an interest in the outcome); *Ward v. Village of Monroeville*, 409 U.S. 57, 61 (1972)(due process violated if a judge would be tempted to not hold the balance nice, clear and true). Much of the Court's case law in this area aspires to draw the line heavily in favor of preserving the public's confidence that the judicial system strives to the utmost to operate fairly.

Consistent with this Court's *Jordan* case, the Bisnos contend that constitutional principles that argue for a due

process right to a mentally competent juror are indistinguishable from a due process right to a mentally competent judicial officer, especially one sitting as the trier of fact in a non-jury trial. Surely, to preserve the public's confidence in the justice systems of the states, mentally incapacitated judicial officers should be promptly removed and tainted decisions reconsidered to assure the guidance of *Jordan* that minimum due process requires a tribunal that is impartial and mentally competent.

B. This Court's Opinion In *Slayton v. Smith* May Dissuade Lower Courts From Protecting The Right To A Mentally Competent Judicial Officer

Smith v. Cox, 435 F. 2d 453 (4th Cir. 1970) is the only federal court of appeals case ever to squarely consider the Fourteenth Amendment Due Process Clause as requiring a judicial officer mentally competent to carry out his duties; however, this Court, in sub nom. *Slayton v. Smith*, 404 U.S. 53 (1971) vacated the Fourth Circuit Court of Appeals' judgment and remanded for the District Court to dismiss the petition for habeas corpus on the ground of failure to exhaust state remedies. *Id.* at 54.

In *Smith v. Cox*, the Fourth Circuit discussed at length that it had no doubt that due process guarantees a mentally competent judicial officer. *Smith, supra*, 435 F. 2d at 459-460. The court also observed that mental incompetence was at least as serious a defect as prejudice or interest on the part of a judge, both of which have already been held constitutionally impermissible. *Id.* at 460. Upon a showing of mental incompetence, the Fourth Circuit opined that a criminal sentence would have to be vacated and re-sentencing conducted by a new judicial officer who was mentally competent. *Id.*

On review, this Court vacated the Fourth Circuit judgment with direction to the District Court to dismiss the petition. *Slayton, supra,* 404 U.S. at 54. In its *per curiam* decision, this Court chastised the Fourth Circuit court for discussing in a published decision any implication of the merits of "so delicate a subject" as a judge's alleged senility. *Id.* Thus, *Smith v. Cox,* the Fourth Circuit decision that expressed such confidence of a constitutional right to a mentally competent judge, is of little precedential value and this Court's vacation of the judgment may have unintentionally reinforced the sense that dementia on the bench is not to be publicly discussed and addressed in an open and frank way that medical professionals now counsel.

C. A Decision From This Court Articulating The Minimum Due Process Parameters Concerning A Right To A Mentally Competent Judicial Officer Could Allow State Flexibility And Experimentation In Methods To Protect The Due Process Right

As the opinion below illustrates, state trial and appellate courts can be impatient and dismissive of reasonable prophylactic measures that might more appropriately balance constitutional interests in a fair tribunal with concerns about a public judicial employee's personal privacy or social taboos that inhibit frank discussions of Alzheimer's disease and dementia.

While constitutional due process represents the absolute minimum standard of judicial performance, states remain free to experiment and impose more strict requirements. The concept of allowing states freedom within constitutional limits is embedded in our nation's constitutional structure and law:

> "It is normally within the power of the State to regulate procedures under which its laws are carried out . . . and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental." *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 821 (1986)(*citing Patterson v. New York*, 432 U.S. 197, 201-202 (1977)).

And what could be more fundamental than a judicial officer, sitting as a trier of fact, who is competent of perceiving the evidence, and determining the facts?

II. The Decision Below Is Incorrect

A. The Court Below Erred In Concluding There Was A Final Judgment That Barred Application Of California's Judicial Disqualification Statute

The logic of the decision below substantially stands or falls on whether the order of Judge Nelson was a final judgment or merely an interlocutory judgment granting a permanent injunction. Relying on its conclusion that the first appeal was from a final judgment, the Court of Appeal held that *Urias v. Harris Farms, Inc.*, 234 Cal.App.3d 415 was distinguishable because in that case the summary judgment had not yet been reduced to final judgment. (App., *infra*, 4a.)

In the Court of Appeal's unpublished decision affirming Judge Nelson's order, the Court of Appeal specifically noted in its opinion that the appeal was authorized *solely* under California Code of Civil Procedure

section 904.1(a)(6), the statutory provision allowing interlocutory appeals of injunctions. (A.A. at p. 412.) Furthermore, at the time of the first appeal, the Court of Appeal characterized the Bisnos' appeal as interlocutory by failing to cite California Code of Civil Procedure section 904.1(a)(1), which authorizes appeals from final judgments. *Ibid.* Specifically, the Court of Appeal decision summarized the status of the appeal as follows:

> "On April 29, 2004, the court entered a permanent injunction requiring the Bisnos to move the sculpture to a spot not visible from the street, and to remove the gates. The Bisnos were further restrained from installing any gates or any item in their front motor court without ARC approval. **The Bisnos appeal from the judgment (order granting the permanent injunction). (Code Civ. Proc., § 904.1, subd. (a)(6).)**" (A.A. at p. 412, bold emphasis added.)

By citing only subdivision (a)(6) for interlocutory appeals of injunctions and not citing subdivision (a)(1) for final judgment appeals, the Court of Appeal's characterization was one of an interlocutory nature and not an appeal from a final judgment. This was also the understanding of the parties.

As set forth in the Statement of the Case, when the controversy over the mental capacity of Judge Nelson erupted and the Bisnos appealed a second time upon the denial of their Motion to Dissolve the Injunction on the ground of the incapacity of Judge Nelson, the Court of Appeal changed its characterization of the first appeal. The first indication that the Court of Appeal had changed its characterization occurred at oral argument on appeal, when for the first time, the court asked questions and asserted a claim that the permanent injunction was a final judgment. The Bisnos's counsel provided information why the first appeal was not

from a final judgment, but this was ignored in the written opinion.

In the opinion below, the Court of Appeal claimed the second appeal was an appeal of a "post-judgment" order. The differing characterization of the first appeal appears in the first sentence of the opinion below: "Defendants Jeanette and Robert Bisno (the Bisnos) appeal from an order denying their **postjudgment** motion to dissolve a permanent injunction." (App., *infra* 2a, bold emphasis added.) The footnote 1 after the first sentence continued this change in the Court of Appeal's characterization of the first appeal:

> "An order **after judgment** denying a motion to dissolve a permanent injunction is appealable under Code of Civil Procedure section 904.1, subdivision (a)(1) and (6). (See *Crespin v. Shewry* (2004) 125 Cal.App.4th 259, 264, fn.3 [22 Cal.Rptr.3d 696].)" (App., *infra* 29a, bold emphasis added.)

In their Petition for Rehearing, the Bisnos attempted to point out to the Court of Appeal that the characterization of the first appeal as a final judgment was inconsistent with a minute order issued by Judge Nelson on June 30, 2004 once the first interlocutory appeal went up to the Court of Appeal. Because none of the parties had addressed this newly raised final judgment issue, the minute order had not been included in the appellate record. For this reason, the Bisnos also moved the Court of Appeal to augment the record to include the June 30, 2004 minute order where Judge Nelson stayed the remainder of the case while on appeal. This minute order is entirely consistent with the Court of Appeal's characterization of the first appeal as interlocutory and is clearly demonstrated in the unpublished opinion for the first appeal. (A.A. at p. 412.)

The Court of Appeal did not seek to correct this plain error when the Petition for Rehearing specifically brought the error to the attention of the court. Instead, without comment, on March 2, 2007, the Court of Appeal issued its order denying the petition for rehearing and denying the motion to augment the record.

B. The Court Below Erred In Holding A Litigant Potentially Aggrieved By A Court Order Tainted By Judicial Officer Mental Incapacity Must Essentially Prove The Existence Of Such Taint Before Entitlement To A Right To Seek Discovery Of The Onset Of The Infirmity Of The Judicial Officer

In the opinion below, after holding that the statement of disqualification was filed after final judgment, the Court of Appeal entertained what kind of showing would be required if a litigant had a right to raise mental incapacity **after** a final judgment. (App., *infra* 27a-28a.) It was this portion of the opinion in which the Court of Appeal articulated its standard for a litigant to obtain a right to conduct discovery to establish whether mental incapacity in fact tainted a trial court's decisions. The Court of Appeal affirmed the trial court's refusal to allow discovery on the theory that "the Bisnos have made no showing to reasonably suggest that such an infirmity infected the issuance of the permanent injunction in their case." (App., *infra*, 28a.)

One is left to wonder precisely what evidence, reasonably available to a litigant, could ever meet the Court of Appeal's standard. The Court of Appeal determined that the Motion Judge properly took judicial notice that the public notification of the California Commission on Judicial Performance that stated it was commencing proceedings to remove Judge Nelson from the bench for degenerative brain

disease. Additionally, the Court of Appeal determined that the Motion Judge correctly took judicial notice of the fact the three statements of disqualification were filed in Department 46 cases and the fact that each of them alleged Judge Nelson was confused in the operation of his courtroom, and that one of them contained allegations of Judge Nelson's confusion dating back to the beginning of 2004. These statements were admitted for the purpose of establishing that these documents were filed for the purposes stated, but not for the truth of the factual allegations about mental incapacity contained in the notification and statements of disqualification.

Thus, the evidence properly before the trial court and the Court of Appeal was:

- That the Commission on Judicial Notice had commenced proceedings against Judge Nelson on the ground of permanent disability as a result of degenerative brain disease (Alzheimer's);

- That in two cases in Department 46 that statements of disqualification had been filed against Judge Nelson on the basis of Code of Civil Procedure section 170.1(a)(7) (that he was not able to perceive facts and conduct proceedings) on the ground of dementia or confusion;

- That Judge Nelson had agreed to his disqualification in at least one of those cases;

- That in the *Harris* case in Department 46 a statement of disqualification had been filed against Judge Nelson on the basis of Code of Civil Procedure section 170.1(a)(7) (that he was not able to perceive facts and conduct proceedings) on the ground of

confusion alleged to have been observed in the court in early 2004;

- That the Bisnos' case was tried in late spring 2004; and

- Alzheimer's disease is known to manifest itself slowly over months or years.

If traditional evidentiary rules apply, even without admission for the truth of the hearsay allegations of mental incapacity alleged in some of the documents, there was significant evidence showing Judge Nelson was likely to have been incapacitated at the time of trial. This conclusion is certainly also supported by the Judge's changing his mind twice about the injunction – odd shifts in judgment and decision-making being a classic symptom of Alzheimer's disease. Nonetheless, the Court of Appeal refused to acknowledge the significance of the evidence it considered properly admitted and instead affirmed the Motion Judge's denial of the opportunity to conduct any discovery.

Furthermore, the filing of a judicial disqualification may or may not justify the application of adversarial evidentiary rules as applied in this case. In order to assure justice is done and decisions that are the product of a diseased mind are struck from the judicial system to protect fundamental due process, it may be proper for a trial court to consider **all evidence** before it and simply give appropriate lesser weight to hearsay evidence in determining whether discovery should be allowed.

The error or purposeful reluctance of the Court of Appeal to allow this discovery illustrates the precise judicial taboo discussed *supra*. There is a tendency to circle the wagons to defend a colleague on the bench – it is human nature. For instance, despite the significant amount of evidence of mental

incapacity in this record at or near the time of their trial, the Court of Appeal in the decision below is almost accusatory of the Bisnos when it states:

> "Following issuance of the remittitur, the Bisnos **sought to avoid the permanent injunction** by filing a statement of disqualification against the trial judge . . . ." (App., *infra*, 3a, bold emphasis added).

The Bisnos's case was just one of 50 cases probably impacted by Judge Nelson remaining on the bench as long as he did, but the implication of this language in the Court of Appeal opinion almost implies the Bisnos were manufacturing the allegation of mental incapacity to "avoid" the injunction.

And, at the conclusion of the opinion, the Court of Appeal, selectively quoted Judge Kozinski of the Ninth Circuit Court of Appeals in *United States v. State of Washington,* 98 F.3d 1159, 1167 (9th Cir. 1996) to again disparage the Bisnos' effort to obtain definitive discovery of when Judge Nelson's infirmity commenced as "nothing more than an attempt 'to rummage through the health records of [a judge] who ruled against them . . . in the hope of coming up with a more compelling showing.'"

In fact, a thorough review of Judge Kozinski's concurring opinion demonstrates that he was criticizing the majority opinion in a federal case where there is no statutory right to challenge a judge's mental competence and the majority opinion had implied Federal Rule of Civil Procedure 60(b)(6) could be an avenue to challenge a judgment years after its entry. Kozinski criticized the majority opinion as an:

> "open invitation to parties to rummage through the health records of judges **who**

> **ruled against them five, ten, even twenty years ago,** in hope of coming up with a more compelling showing – or a district judge more receptive to the idea of reopening past judgments." *United States v. State of Washington*, *supra*, 98 F.3d at 1167, bold emphasis added.

The Bisnos undertook the filing of a statement of disqualification prior to the entry of a final judgment and in no way was seeking to overturn some ancient court ruling as the Indian Tribes sought to do in *United States v. Washington*.

These accusatory statements by the Court of Appeal telegraph the undercurrent of hostility toward retrying this case, despite the likelihood it was tainted by debilitating brain illness. It may also reflect the continuing taboo in the judiciary to frankly and openly discuss senile dementia and its impacts on the judicial system. These factors may have played a role in the refusal of the Court of Appeal to thoroughly assess the due process implications and balance the privacy interests of Judge Nelson and his family. In denying an opportunity to seek more definitive evidence of when Judge Nelson became impaired, the Court of Appeal ran roughshod over the due process rights of the Bisnos.

III. The Decision Below Is Final For Purposes Of 28 U.S.C. § 1257(a).

The Bisnos have consistently understood that both of their appeals to the California Court of Appeals, one from the grant of the injunction against them and one from the denial of the dissolution of the injunction, to be interlocutory. At the time of the first appeal, there existed a minute order staying the remainder of the case and an appeal recognized by the Court of Appeal as having been prosecuted only under

California Code of Civil Procedure section 904.1(a)(6)(interlocutory appeal of injunctions). When the remittitur returned, it was entirely appropriate for all parties to believe that further action was required to end the stay of the action, resolve remaining issues like attorneys' fees, and enter a final judgment. This understanding of the law is consistent with *Crespin v. Shewry*, the case cited by the Court of Appeal in support of the proposition that a permanent injunction after a final judgment is always appealable. The court in that case also emphasized that a permanent injunction "is in essence of an executory or continuing nature" and "always subject, upon proper showing, to modification or dissolution" and as such did not determine "all issues, or end the litigation as to any party." *Crespin v. Shewry*, 125 Cal.App.4th 259, 269 (2004).

On the basis of this understanding of the law of injunction, the Bisnos reasonably thought that the return of the remittitur after the first appeal reinvested the trial court with jurisdiction at the end of an interlocutory appeal. It was at this point that Bisnos filed the statement of disqualification after having just learned of the administrative leave of Judge Nelson and concluding their own investigation that showed evidence of mental impairment in other cases prior in time to their own bench trial.

Such an interlocutory set of appeals might argue for a lack of finality within the meaning of 28 U.S.C. § 1257(a), however, the facts of this case auger for a conclusion that this case is final within the meaning of this Court's jurisdictional statute.

There can be little doubt that contrary to the understanding of the Bisnos and their counsel of the interlocutory nature of the appeals regarding the injunction, both the California Court of Appeal and its Supreme Court have spoken in the opinion below claiming that the first

appeal was not an interlocutory appeal, but rather an appeal of a "final judgment." Thus, the State of California, through its appellate courts, claim finality and have made decisions contrary to the interests of the Bisnos based upon those conclusions of finality. The record here firmly commits the State of California to undertake no further review of these decisions without this Court's intervention.

As this Court observed in *Department of Banking v. Pink*, 317 U.S. 264, 286:

> "the test is not whether under local rules of practice the judgment is denominated final * * * but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court."

There is no question that the Court of Appeal and Supreme Court of California opinions meet this test of finality for the purposes of this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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COURT OF APPEAL OF CALIFORNIA,
SECOND APPELLATE DISTRICT,
DIVISION FOUR

NORTH BEVERLY PARK HOMEOWNERS ASSOCIATION,
Plaintiff and Respondent,

v.

JEANNETTE A. BISNO et al.,
Defendants and Appellants.

February 13, 2007, Filed

COUNSEL: Burke, Williams & Sorensen, James B. Hicks; Mintz & Werner and Marshall G. Mintz for Defendants and Appellants.

Wolf, Rifkin, Shapiro & Schulman, Marc E. Rohatiner and Denise M. Parga for Plaintiff and Respondent.

JUDGES: Willhite, Acting P. J., with Manella and Suzukawa, JJ., concurring.

OPINION BY: Willhite

OPINION

WILLHITE, Acting P. J.—

INTRODUCTION

Defendants Jeannette and Robert Bisno (the Bisnos) appeal from an order denying their postjudgment motion to dissolve a permanent injunction.[1] This appeal is their second in a lawsuit brought against them by plaintiff North Beverly Park Homeowners Association (the Association).

Beginning in 1999, the Bisnos planned to build a home in North Beverly Park, a luxury community in Beverly Hills. The Association's architectural review committee disapproved certain aspects of the Bisnos' plans, including the design of their front gates, and a particular sculpture they intended to place in their motor court. In June 2002, the Association sued the Bisnos for breach of covenants, nuisance, and trespass. As here relevant, the Association sought an injunction preventing the Bisnos from installing the front gates and sculpture. The trial judge initially granted a preliminary injunction prohibiting installation of the sculpture and gates. Ten months later, on the Bisnos' motion, the court dissolved the injunction. The Bisnos then installed the sculpture and gates.

From March 8 through March 26, 2004, the trial judge held a nonjury trial on the Association's complaint. On April 29, 2004, the judge entered a permanent injunction requiring the Bisnos to move the sculpture to a spot not visible from the street, and to remove the gates. The injunction further restrained the Bisnos from installing any gates or items in their front motor court without permission from the architectural review committee.

The Bisnos appealed. In an unpublished opinion, we affirmed the judgment.[2] The Bisnos' petition for review

to the California Supreme Court was denied, and the remittitur issued on October 13, 2005.

Following issuance of the remittitur, the Bisnos sought to avoid the permanent injunction by filing a statement of disqualification against the trial judge under Code of Civil Procedure section 170.1, subdivision (a)(7), on the ground that he suffered an impairment of memory preventing him from recalling the trial testimony.[3] The Bisnos also filed a motion to dissolve the permanent injunction under Civil Code section 3424, alleging that the judge's impairment required dissolving the injunction in the interests of justice. In support of this motion, the Bisnos attempted to use, inter alia, the trial judge's failure to respond to their statement of disqualification as evidence that the trial judge consented to disqualification, requiring that their allegations be deemed true.

The matter was assigned to a different judge, whom we shall refer to, for clarity, as the motion judge. The motion judge denied the motion to dissolve the permanent injunction.

The Bisnos now appeal from the order denying their motion. In response to their various contentions, we hold that the statutory procedure for disqualification of judges for cause (§ 170.3) does not apply to final judgments. Therefore, the trial judge's failure to answer or strike the Bisnos' statement of disqualification, which was filed and served after final judgment, does not constitute consent to retroactive disqualification, and does not require that the allegations of the statement of disqualification be deemed true. Further, we find the primary decision on

which the Bisnos rely, *Urias v. Harris Farms, Inc.* (1991) 234 Cal. App. 3d 415 [285 Cal. Rptr. 659] (*Urias*), to be distinguishable (it involved a judgment not yet final), and conclude that its reasoning does not apply to require application of the statutory disqualification procedure to final judgments. Finally, we conclude that even if the analysis of *Urias* were to apply here, the Bisnos' statement of disqualification failed to allege sufficient facts to compel the trial judge's disqualification.

Concerning the Bisnos' motion to dissolve the permanent injunction, we assume (without deciding) that a judge's disability may be a basis in equity under Civil Code section 3424 to dissolve a permanent injunction that is the subject of a final judgment. Nonetheless, we conclude that the Bisnos failed to meet their burden of proof, and that the motion judge did not abuse his discretion in refusing to dissolve the injunction and in denying the Bisnos' request for discovery of the trial judge's mental condition. Therefore, we affirm the judgment.

DISCUSSION

I. *The Statement of Disqualification*

The remittitur in the prior appeal issued on October 13, 2005. Approximately six weeks later, on November 30, 2005, the Bisnos filed in the trial court a verified "Statement of Disqualification." The document identified the trial judge by name, as well as his department number, and stated: "Trial Date: March 8, 2004." However, nowhere did it clearly state that it was seeking the trial judge's retroactive disqualification.

Nor did it state that it was seeking to have the final judgment vacated.

In the body of the document, the Bisnos' attorney purported to "object to the hearing of the above matter by the [named trial judge], on the grounds that the judge is disqualified from hearing and determining this matter" under section 170.1. The stated ground was that the judge "is unable to properly perceive the evidence or is unable to properly conduct the proceeding because of a permanent or temporary physical impairment in that [he] is suffering from an impairment of memory which prevents him from recalling the testimony adduced at trial." Although the statement did not identify the particular statutory ground for disqualification, it is apparent that it referred to section 170.1, subdivision (a)(7), which provides that a judge is disqualified if "[b]y reason of permanent or temporary physical impairment, the judge is unable to properly perceive the evidence or is unable to properly conduct the proceeding."

In support of this ground, the Bisnos' attorney alleged the following supporting facts: "In instances subsequent to the trial of this action, [the judge] has exhibited to other lawyers a lack of memory and concentration while he was on the bench. I now believe that [he] was suffering from such lack of memory and concentration while acting as the trier of fact in this case and his physical impairments, while existing at the time of trial, became more manifest subsequent to the trial. I am informed and believe that [the trial judge's] impairments reached the point where he was put on administrative leave by the Superior Court. I first became concerned about [the trial judge's] physical

impairments on or about October 17, 2005 through a conversation with another lawyer who knew that I had a case before [the judge] and himself had information about [the judge] having been placed on administrative leave and the reasons therefore. I subsequently followed up and confirmed that information with another lawyer known to me who also had a case before [the judge] and who informed me of his personal observations of [the judge's] physical impairments which manifested themselves in a lack of memory and concentration while on the bench."

The Bisnos personally served the statement of disqualification on the trial judge at his residence on December 6, 2005. The judge was then on leave from the court, apparently based on his medical condition, and never responded to the statement of disqualification.

Relying on *Urias, supra*, 234 Cal. App. 3d 415, and section 170.3, subdivision (c)(4), the Bisnos argue that the trial judge's failure to respond constituted a consent to disqualification, and that the statement of disqualification must be deemed true. Therefore, according to the Bisnos, the judge was disqualified based on his impairment of memory during the trial. As a result, the judgment must be vacated and the permanent injunction dissolved.

California law holds that rulings by a judge later found to be disqualified are either "void" or "voidable"—the precise label depending on which line of authority the particular court decides to follow. (See *Christie v. City of El Centro* (2006) 135 Cal.App.4th 767, 776, 779–780 [37 Cal. Rptr. 3d 718], & cases cited therein [noting

conflict, and concluding that the decision in *Giometti v. Etienne* (1934) 219 Cal. 687, 688–689 [28 P.2d 913] compels lower courts to find rulings by disqualified judge void rather than voidable]; cf. 2 Witkin, Cal. Procedure (4th ed. 1996) Courts, §§ 91–95, pp. 127–135 [advocating view that because court has subject matter jurisdiction, disqualified judge's rulings are voidable rather than void].) The distinction is important when dealing with a final judgment, because "a party seeking to set aside a voidable judgment or order must act to set aside the order or judgment before the matter becomes final" (*Christie, supra*, 135 Cal.App.4th at p. 780), whereas describing the judgment as void—meaning the court lacks subject matter jurisdiction—suggests that the judgment is subject "to *collateral attack* at any time," a result Witkin accurately describes as "highly undesirable" (2 Witkin, *supra*, § 93, p. 131). Whether a judgment rendered by a disqualified judge is considered void or voidable, the issue of disqualification must be raised at the earliest reasonable opportunity after the party becomes aware of the disqualifying facts. (*Urias, supra*, 234 Cal. App. 3d at p. 425.)

Of course, the instant case involves a final judgment. Trial was held (with no mention of the judge's purported incapacity), and judgment was entered by the trial court. On the Bisnos' appeal, we affirmed. The Bisnos' petition for review to the California Supreme Court was denied, and the remittitur issued. Thus, the judgment of the trial court is final for all purposes. (See 9 Witkin, *supra*, Appeal, § 728, pp. 758–759; *id.*, § 731, pp. 761–762; *id.*, § 733, pp. 762–763.)

Without discussion, the Bisnos simply assume that the statutory procedure for disqualification of judges for cause set forth in section 170.3 applies to final judgments, and that judges must respond accordingly to statements of disqualification filed after final judgment or risk automatic disqualification and the vacating of their judgment. However, no California decision has involved an attempt to use the statutory disqualification procedure to vacate a final judgment on the ground of the trial judge's disqualification. Some decisions involve an attack on a nonfinal judgment by a separate action in equity; others, a direct attack on such a judgment by a motion to vacate the judgment, or a statement of disqualification under the statutory disqualification scheme. But none of these decisions approves use of the statutory procedure to retroactively disqualify the trial judge so as to attack a final judgment.[4] Indeed, the language of the current disqualification statutes makes clear that the procedural scheme is directed at pending proceedings.

Section 170.3, subdivision (a)(1), provides in relevant part that "[i]f a judge determines himself or herself to be disqualified, the judge shall notify the presiding judge ... and shall not further participate *in the proceeding* [with exceptions not here relevant], unless his or her disqualification is waived by the parties as provided in [section 170.3,] subdivision (b)." (§ 170.3, subd. (a)(1), italics added.) The word "proceeding" is defined as "the action, case, cause, motion, or special proceeding *to be tried or heard by the judge*." (§ 170.5, subd. (f), italics added.) Thus, section 170.3, subdivision (a)(1), contemplates a judge disqualifying himself or herself from pending proceedings—those *to be* tried or

heard—not from proceedings in which a final judgment has been entered.

Under the statutory scheme, a party files a statement of disqualification when "a judge who should disqualify himself or herself refuses or fails to do so." (§ 170.3, subd. (c)(1).) Further, the party's statement of disqualification "object[s] to the hearing or trial *before the judge*," not to the hearing or trial *previously* before the judge, in which the judgment is now final. (§ 170.3, subd. (c)(1), italics added.)

The disqualification statutes expressly cover the situation in which the "grounds for disqualification are first learned of or arise after the judge has made one or more rulings in a proceeding, *but before the judge has completed judicial action in a proceeding*." (§ 170.3, subd. (b)(4), italics added.) In that situation, the judge "shall, unless the disqualification be waived, disqualify himself or herself, but in the absence of good cause the rulings he or she has made up to that time shall not be set aside by the judge who replaces the disqualified judge." (§ 170.3, subd. (b)(4).) The scheme also has a procedure when "a statement of disqualification is filed after a trial or hearing has commenced by the start of voir dire, by the swearing of the first witness or by the submission of a motion for decision." (§ 170.4, subd. (c)(1).) Under this procedure, "the judge whose impartiality has been questioned may order the trial or hearing to continue, notwithstanding the filing of the statement of disqualification[,] ... and if it is determined [by another judge] that the judge is disqualified, all orders and rulings of the judge found to be disqualified made after the filing of the statement shall be vacated." (§ 170.4, subd. (c)(1).) The statutory scheme thus has

procedures applicable before judicial action is completed and when a statement of disqualification is filed midtrial or midhearing. However, it does not have a procedure applicable when the issue of disqualification is first raised after final judgment—a clear indication that the Legislature never contemplated applying the statutory disqualification procedure in such a circumstance.

It is in the context of the statutory procedure as a whole that the judge's duty to answer or strike a statement of disqualification must be understood. (See *Glassman v. McNab* (2003) 112 Cal.App.4th 1593, 1600 [6 Cal. Rptr. 3d 293] [statute must be construed in the context of the statutory scheme, with an eye to harmonizing the various parts].) The judge's option to answer (or to formally consent to disqualification) is contained in section 170.3, subdivision (c)(3). That subdivision provides that "[w]ithin 10 days after the filing or service [of the statement of disqualification], whichever is later, the judge may file a consent to disqualification ... or the judge may file a written verified answer admitting or denying any or all of the allegations contained in the party's statement and setting forth any additional facts material or relevant to the question of disqualification." The option to strike the statement of disqualification arises under section 170.4, subdivision (b), which provides that the judge "may order [the statement] stricken" if it is untimely or fails to disclose grounds for disqualification.

The automatic disqualification provision of section 170.3, subdivision (c)(4), on which the Bisnos rely, provides that "[a] judge who fails to file a consent or answer within the time allowed *shall be deemed to have*

consented to his or her disqualification ... ." (Italics added.) Further, as the Bisnos note, it is generally stated that if the judge fails to answer or strike a statement of disqualification, the facts alleged in the statement must be deemed to be true. (See *Urias, supra*, 234 Cal. App. 3d at p. 424.)

But automatic disqualification under section 170.3, subdivision (c)(4), and the related rule that facts alleged in the statement of disqualification are deemed true if the judge does not respond, do not exist outside the statutory procedure as a whole. The statutory procedure clearly contemplates the judge responding to statements of disqualification filed in pending proceedings, not those filed after final judgment. Thus, to apply the automatic disqualification provision to disqualify a judge for failing to respond to a disqualification statement filed after final judgment would be to apply the provision beyond its intended use.

By its terms, therefore, the procedural scheme of the disqualification statutes does not apply to statements of disqualification filed after final judgment. Hence, the trial judge's failure to answer or strike the Bisnos' statement of disqualification cannot be deemed consent to disqualification under section 170.3, subdivision (c)(4), and cannot require that the allegations in the statement be deemed true.

The Bisnos' reliance on *Urias, supra*, 234 Cal. App. 3d 415, is misplaced. There, the trial judge granted the defendant's motion for summary judgment, and entered judgment for the defendant. The plaintiff then filed a series of statements of disqualification requesting that

the judge be disqualified, and that his ruling on summary judgment be voided. The stated ground was that the judge was disqualified under section 170.1, subdivision (a)(2), because the judge's former law firm had represented the defendant in prior litigation for the past 10 years. (234 Cal.App.3d at p. 419.) The trial judge did not respond to any of the requests for disqualification, nor did he strike them. (*Ibid.*) The issue of disqualification was assigned to a different judge, who ruled under section 170.3, subdivision (c)(4), that the challenged judge had consented to disqualification by failing to respond.

The Court of Appeal affirmed the challenged judge's disqualification. First, the court held that by failing to respond to the statement of disqualification, the judge consented to disqualification under section 170.3, subdivision (c)(4), for "failing to respond to an allegedly untimely and legally insufficient statement of disqualification." (*Urias, supra*, 234 Cal.App.3d at p. 420, italics omitted.) Next, the court considered whether the summary judgment had to be reversed in light of the judge's subsequent disqualification. (*Id.* at p. 422.) The court noted that "the disqualification statutes do not prescribe a remedy for this situation where the judge is found to be disqualified after judgment is entered, and the only ruling in issue is a summary judgment which disposed of all the issues in the case." (*Id.* at p. 423.) Nonetheless, the court referred to earlier decisions under former disqualification statutes permitting the vacating of a judgment on the basis that the judge who rendered it was later found to be disqualified. (*Ibid.*) Among other decisions, the court referred to *Cadenasso v. Bank of Italy, supra*, 214 Cal. at page 569, and observed that

the court in *Cadenasso* stated that a challenge to " 'the trial judge by reason of his interest in the subject matter of the suit may be made at any time before the judgment becomes final' but expressed no opinion on whether an action to vacate the judgment would lie after the judgment became final." (*Urias, supra,* 234 Cal. App. 3d at p. 423.) Agreeing with authorities suggesting that rulings by a disqualified judge are voidable rather than void, the court reasoned: "A party who seeks to declare a judgment void on the ground the judge was disqualified must allege and prove facts which clearly show that such disqualification existed. [Citation.] [¶] Under those authorities, the grant of summary judgment in this case is voidable if [plaintiff] 'properly raised' the disqualification issue and alleged facts which show the judge was disqualified to hear the case." (*Id.* at p. 424.)

Because the judge had consented to disqualification, the court deemed the facts alleged in the statement of disqualification to be true. (*Urias, supra,* 234 Cal.App.3d at p. 424.) The court determined that the statement was filed at the " 'earliest practicable opportunity' " after the plaintiff discovered the disqualifying facts (*id.* at p. 425), and also found that the statement alleged adequate facts to disqualify the judge, namely, that within the last two years the defendant was a client of the judge's former law firm and partner. (*Id.* at p. 426.) The court concluded: "Accordingly, plaintiff raised the issue of the judge's disqualification in a timely manner after the judge had completed judicial action in the proceeding and before the judgment was final. Further, his uncontradicted allegation established disqualification under section 170.1, subdivision (a)(2). Because the summary

judgment was rendered by a disqualified judge, the judgment was voidable upon plaintiff's objection." (*Id.* at p. 426.)

On its face, the decision in *Urias* is distinguishable. There, the court agreed with the line of authority declaring judgments rendered by disqualified judges voidable rather than void. Thus, the court found the statements of disqualification timely because they were filed "after the judge had completed judicial action in the proceeding *and before the judgment was final.*" (*Urias, supra*, 234 Cal. App. 3d at p. 426, italics added.) Of course, here the Bisnos' statement of disqualification was filed after a final judgment on appeal. Thus, under the literal holding of *Urias*, the Bisnos' statement of disqualification was not timely.

Further, *Urias*'s interpretation of the statutory procedure cannot be extended to require that we deem the trial judge to have consented to disqualification by the Bisnos, or that we deem the allegations of the Bisnos' statement of disqualification to be true. The court in *Urias* conceded that the statutory disqualification scheme does "not prescribe a remedy for this situation where the judge is found to be disqualified after judgment is entered." (*Urias, supra*, 234 Cal.App.3d at p. 423.) Nonetheless, the court applied what is, in essence, the remedy provided by section 170.3, subdivision (c)(4): The court concluded that by failing to answer the statement of disqualification or strike it, the judge consented to disqualification, and also concluded that the facts alleged in the statement of disqualification must be deemed true. (234 Cal.App.3d at pp. 422, 424.)

We have no occasion on the facts here to disagree with the specific holding in *Urias* that section 170.3, subdivision (c)(4), applies to statements of disqualification filed in proceedings in which a judgment has been entered, but is not yet final. We caution only that the reasoning of *Urias* does not govern statements of disqualification filed after *final* judgment. As we have explained, the statutory disqualification procedure does not apply to statements of disqualification filed after final judgment. Thus, regardless of the analysis used in *Urias*, section 170.3, subdivision (c)(4), cannot be used to retroactively disqualify a nonresponding trial judge after final judgment; nor in those circumstances can it be used to deem the allegations of the disqualification statement true and require the vacating of the judgment.

Finally, even if we were to conclude that the statutory disqualification scheme applies to final judgments, and that we must assume the truth of the Bisnos' statement of disqualification, we would nonetheless hold that the trial judge was not disqualified. As stated in *Urias*, the party seeking to have a judgment declared void on the ground that the judge was disqualified must produce facts "which clearly show that such disqualification existed." (*Urias, supra*, 234 Cal. App. 3d at p. 424.) In *Urias*, the allegations in the statement of disqualification, which were assumed to be true, stated sufficient facts to meet the prior representation ground of disqualification under section 170.1, subdivision (a)(2). Here, by contrast, the Bisnos' statement of disqualification failed to allege facts clearly showing that the trial judge was disqualified for incapacity under section 170.1, subdivision (a)(7).

In the statement of disqualification, the Bisnos' attorney purported to "object to the hearing of the above matter by the [named trial judge], on the grounds that the judge is disqualified from hearing and determining this matter" under section 170.1. The stated ground for disqualification was that the judge "*is* unable to properly perceive the evidence or *is* unable to properly conduct the proceeding because of a permanent or temporary physical impairment in that [he] *is* suffering from an impairment of memory which prevents him from recalling the testimony adduced at trial." (Italics added.) This assertion relates to the judge's *current* ability to perceive evidence and to conduct proceedings. Of course, such an assertion is irrelevant to the judge's condition during the trial more than 19 months earlier. It certainly does not "clearly show" (*Urias, supra*, 234 Cal. App. 3d at p. 424) that the ground for disqualification existed during the trial. Indeed, nowhere does the statement of disqualification mention that the Bisnos were seeking to retroactively disqualify the trial judge, vacate the judgment, and dissolve the permanent injunction.

Further, the only facts alleged in support of disqualification related to instances of incapacity *after* the trial. The Bisnos' attorney declared: "In instances *subsequent to the trial of this action*, [the judge] has exhibited to other lawyers a lack of memory and concentration while he was on the bench. I now believe that [he] was suffering from such lack of memory and concentration while acting as the trier of fact in this case and his physical impairments, while existing at the time of trial, became more manifest subsequent to the trial. I am informed and believe that [the trial judge's] impairments reached the point where he was put on

administrative leave by the Superior Court. I first became concerned about [the trial judge's] physical impairments on or about October 17, 2005 through a conversation with another lawyer who knew that I had a case before [the judge] and himself had information about [the judge] having been placed on administrative leave and the reasons therefore. I subsequently followed up and confirmed that information with another lawyer known to me who also had a case before [the judge] and who informed me of his personal observations of [the judge's] physical impairments which manifested themselves in a lack of memory and concentration while on the bench."

Pointedly lacking from this recitation are any facts even remotely demonstrating the judge's purported incapacity during the Bisnos' trial. Not a single instance of erratic conduct or material loss of memory at trial suggesting incapacity is mentioned. That counsel, in retrospect, now believed that the judge was incapacitated adds nothing to the calculus. Hence, even if assumed to be true, the statement of disqualification fails to meet the Bisnos' burden of clearly proving that the trial judge was disqualified under section 170.1, subdivision (a)(7) during the trial.

II. *The Motion to Dissolve the Permanent Injunction*

Besides filing and serving a statement of disqualification, the Bisnos separately moved to dissolve the permanent injunction under Civil Code section 3424. That section provides, in relevant part: "Upon notice and motion, the court may modify or dissolve a final injunction upon a showing ... that the ends of justice would be served by the modification or

dissolution of the injunction." (Civ. Code, § 3424, subd. (a).) The Bisnos argued that "the ends of justice" required dissolution of the injunction because it was issued by a judge suffering from a disabling infirmity that prevented him from recalling the testimony at trial.

In substance, the Bisnos' motion is the equivalent of an equitable attack on a final judgment, seeking to vacate it based on retroactive disqualification of the judge for mental incapacity. A definitive ruling on whether a final judgment can be vacated on such a ground should await decision in a case where an otherwise adequate factual basis is provided, and the issue is adequately briefed. This is not such a case.

We shall assume (without deciding) that a motion to dissolve a permanent injunction subject to a final judgment may be made on the ground that the judge who issued it was disqualified for mental incapacity. As we have noted, the party seeking to have a judgment declared void on the ground that the judge was disqualified must produce facts "which clearly show that such disqualification existed." (*Urias, supra*, 234 Cal.App.3d at p. 424.) Because such a motion lies in equity, the ruling denying the motion is reviewed for abuse of discretion. (*Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 771 [110 Cal. Rptr. 2d 861].) "Under that standard, we resolve all evidentiary conflicts in favor of the judgment and determine whether the court's decision ' "falls within the permissible range of options set by the legal criteria." ' [Citations.]" (*Ibid.*)

On December 8, 2005, the Bisnos filed their motion to dissolve the permanent injunction. They later

supplemented the motion on December 20, 2005. The basis of the motion was the Bisnos' contention that the trial judge was suffering from mental infirmities at the time of the trial that prevented him from recalling the testimony adduced at trial.

In support of the motion, the Bisnos' attorney filed a declaration in which he stated that he first became aware of the trial judge's mental infirmities on October 17, 2005, when informed by another attorney. In his supplemental showing, counsel declared that he learned that the Commission on Judicial Performance had commenced proceedings against the trial judge, seeking his removal on the ground that he suffered from degenerative brain disease that prevented him from performing his duties.

The motion judge found no competent evidence that the trial judge was incompetent during the trial, and denied the motion to dissolve the injunction. We find no abuse of discretion in that ruling. We discuss each category of evidence produced by the Bisnos in turn.

A. *The Trial Transcript*

The Bisnos presented 59 excerpts from the reporter's transcript of the 2004 bench trial. Through hindsight, the Bisnos' attorney contended that the excerpts showed the judge's disqualifying lapses of memory.

We have independently examined the excerpts in the context of the record as a whole.[5] Most are too trivial to mention in any detail. They depict such minor incidents as the judge once saying that he forgot the question asked by counsel, the judge asking for clarification of

exhibit numbers,[6] the judge asking for clarification of whether an objection had just been made and the judge saying "pardon" in response to statements of counsel. Only three excerpts depict the judge expressing a lack of recollection concerning portions of the evidence: he did not remember a stipulation relating to the last page of exhibit No. 611; he did not remember testimony elicited "last week" concerning Robert Bisno's dispute with a member of the Association's architectural review committee, Brian Adler; and he did not recall the Bisnos' neighbor, Mike Medavoy, testifying that he liked the sculpture that the Association sought to have the Bisnos remove.

Such minor lapses certainly do not suggest that the judge suffered from a debilitating lack of memory sufficient to disqualify him from the proceeding. Indeed, at the hearing on the motion to dissolve the permanent injunction, the Bisnos' attorney conceded that during the trial nothing in the judge's conduct led him to believe the judge was disabled. Moreover, in opposition to the Bisnos' motion, the Association produced voluminous excerpts demonstrating instances of the trial judge's command of the proceedings and the evidence. There is simply nothing in the record of the trial that reasonably tends to show that the judge was suffering from a disqualifying mental disability.

B. *Disqualification Motions in Other Cases*

The Bisnos requested that the motion judge take judicial notice of motions to disqualify the trial judge from pending proceedings in three other cases. In the first (*Morgan v. California Federal Bank* (Super. Ct. L.A. County, No. BC308284)), a statement of

disqualification was filed on April 20, 2005. The attorney for the moving party declared that the judge exhibited confused and unfocused behavior during proceedings occurring on April 11 through 13, 2005. In the second case (*Hunter v. State Farm Fire & Casualty* (Super. Ct. L.A. County, No. BC262742)), a motion to disqualify the judge was filed on April 25, 2005. The attorney for the moving party declared that in proceedings occurring on April 11, 20, and 21, 2005, the judge was confused and unaware of activities in the courtroom. On May 13, 2005, the judge consented to disqualification in that case, and the case was transferred to another judge.

In the third case (*Harris v. Investor's Business Daily, Inc.* (Super Ct. L.A. County, No. BC269313)), the statement of disqualification was filed on December 16, 2005. The attorney for the moving party declared that he first became suspicious of the trial judge's mental impairment in early 2004, but did not have sufficient evidence to move for disqualification until December 15, 2005.

The motion judge took judicial notice of the declarations filed in these three cases, but not of the truth of their hearsay contents. The ruling was correct. The hearsay rule applies to statements contained in judicially noticed documents, and precludes consideration of those statements for their truth unless an independent hearsay exception exists. (See 1 Witkin, Cal. Evidence (4th ed. 2000) Judicial Notice, § 25, p. 119.) There is a hearsay exception for the use of declarations in motion practice, but that exception applies to declarations filed in support of motions in the present action, not those filed in other actions. Section

2009 provides that "[a]n affidavit may be used ... upon a motion." Under section 2015.5, declarations under penalty of perjury may be used in lieu of affidavits. (§ 2015.5.) Thus, under section 2009, affidavits and declarations may be used in support of a motion, even though they are hearsay. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2006) ¶ 9:46, p. 9(I)-24.) However, the "motion" referred to in section 2009 is a motion filed in the case at hand—section 1004 provides that "motions must be made in the court in which the action is pending." Thus, the limited hearsay exception of section 2009 for affidavits and declarations in support of a motion applies to motions filed in the present case, not those filed in support of motions in unrelated cases.

Nonetheless, even if the declarations are considered for their truth, they do not reasonably tend to prove that the judge was incapacitated during the Bisnos' 2004 trial. One of the declarations involved allegations of the judge's confused and unfocused behavior during proceedings on April 11 through 13, 2005. Another involved allegations of similar conduct occurring on April 11, 20, and 21, 2005. In the latter case, the judge consented to disqualification on May 13, 2005, and the case was transferred to another judge. Of course, the Bisnos' case was tried, and the permanent injunction issued, *more than one year before* these alleged incidents (trial Mar. 8–Mar. 26, 2004; permanent injunction issued Apr. 29, 2004). Thus, without more, these two declarations are irrelevant to prove that the judge was disqualified during the Bisnos' proceedings.

In the third declaration, the attorney seeking the judge's disqualification declared that he first became

suspicious of the trial judge's mental impairment in early 2004, but did not have sufficient evidence to move for disqualification until December 15, 2005. This attorney's mere suspicion of the judge's mental impairment in early 2004, without real evidence until December 2005, does not reasonably tend to show that the judge was incapacitated when he issued the permanent injunction in the Bisnos' case, especially when considered in light of the lengthy trial record, which discloses no evidence of disqualifying impairment, and gave no participating attorney any concern over the trial judge's physical or mental state.

C. *Notice of Proceedings by Commission on Judicial Performance*

Finally, the Bisnos' attorney requested that the trial court take judicial notice of the notice of formal proceedings instituted by the Commission on Judicial Performance on or about December 7, 2005.[7] The notice alleged that the judge suffered from a disability (degenerative brain disease) that seriously interfered with his judicial performance and was likely to become permanent.

The trial court correctly took judicial notice of the institution of proceedings, but not of the truth of the allegations in the notice. (See *Columbia Casualty Co. v. Northwestern Nat. Ins. Co.* (1991) 231 Cal. App. 3d 457, 473 [282 Cal. Rptr. 389].) Although the allegations of the notice clearly cannot be considered for their truth, they would add nothing to the Bisnos' showing, even if considered true. The notice was not filed until more than 19 months after the permanent injunction was issued on April 29, 2004, and it fails to specify exactly

when the alleged medical condition reached the point where it purportedly interfered with the judge's performance.

D. *Conclusion*

Thus, assuming (without deciding) that a permanent injunction subject to a final judgment may be dissolved on the ground that the judge who issued it was disqualified for mental incapacity, the Bisnos failed to meet their burden of clearly proving that the disqualifying condition existed. (*Urias, supra*, 234 Cal. App. 3d at p. 424.) Therefore, the motion judge did not abuse his discretion in denying the motion.

In this regard, we find the instant case analogous to *U.S. v. State of Wash.* (9th Cir. 1996) 98 F.3d 1159. There, in 1979 the district court judge issued a ruling holding that the plaintiffs, certain Indian tribes, had no fishing rights under a treaty. (*Id.* at p. 1162.) Before issuing his ruling, the judge had had surgery for an aortic aneurysm, and informed all counsel that because of his health, he had requested that the Chief Judge remove him from the case. The tribes, however, asked that the judge decide the case. The Chief Judge granted their request, and the district judge then ruled. The Ninth Circuit affirmed the judge's ruling, and the United States Supreme Court denied certiorari. (*Ibid.*)

However, in June 1992, a Seattle newspaper reported that when he ruled in 1979, the judge was suffering from Alzheimer's disease. The article noted that the judge's death certificate listed Alzheimer's, which set in during 1978, as a secondary cause of death. The article quoted the judge's son as stating that the judge was

articulate until February 1978, when he went into a decline that ended with his death in 1984. The judge's son also stated that he believed the judge was competent when he ruled in 1979. (*U.S. v. State of Wash., supra*, 98 F.3d at p. 1162.)

In November 1993, the Indian tribes filed a motion in the district court under Federal Rules of Civil Procedure, rule 60(b)(6) (28 U.S.C.), to obtain relief from the 1979 judgment. Rule 60(b)(6), permits relief from a final judgment "upon such terms as are just" and for "any ... reason justifying relief from the operation of the judgment." The tribes later argued that the motion was for the limited purpose of obtaining discovery concerning the trial judge's mental health at the time he made his 1979 ruling. (*U.S. v. State of Wash., supra*, 98 F.3d at p. 1162.) The district court denied relief, and a divided panel of the Ninth Circuit affirmed.

The Ninth Circuit majority noted that Federal Rules of Civil Procedure, rule 60(b)(6), provided an equitable remedy to prevent manifest injustice under extraordinary circumstances. The majority held that the trial judge's possible mental incompetence did not constitute extraordinary circumstances justifying the vacating of the judgment. The majority reasoned: "The Three Tribes argue that [rule] 60(b)(6) relief should be granted and discovery allowed because of the possibility that they were denied a competent fact-finder when their treaty status was decided by [the trial judge]. This is not one of those rare cases where 'extraordinary circumstances' warrant vacating an 'erroneous judgment.' The Three Tribes offer only [the trial judge's] death certificate and the Seattle Post-Intelligencer Article to support their contention that

[the judge] may have suffered some mental impairment in 1979. The death certificate states that [the judge] was diagnosed with Alzheimer's sometime in 1978. In the newspaper article [the judge's] son says that his father was a changed man after his 1978 surgery, but that he was mentally competent when he decided the tribes' treaty status. The correspondence from [the judge] shows that the judge knew his surgery had physically weakened him and that he also knew of his obligation to decide the tribes' treaty status. When he felt unable to fulfill his commitment to decide the tribes' status 'within the next several months,' he asked [the Chief Judge] to remove him from the case. The tribes responded by requesting that [the judge] rule on their status before stepping down. [The Chief Judge] allowed their motion and [the judge] ruled. We should not reopen a judgment under these circumstances. Moreover, this court, as well as a magistrate judge, closely examined the case and reached the same conclusion as [the trial judge]. A decision on the issue of whether Rule 60(b)(6) gives the district court the power to correct a manifest injustice arising from a judge's disability should await the extraordinary circumstances in which it might be presented. The district court did not abuse its discretion in denying the Three Tribes' motion to reopen the judgment and allow discovery." (*U.S. v. State of Wash., supra*, 98 F.3d at pp. 1163–1164.)

Similarly, in the instant case, the Bisnos have produced weak evidence, at best, that the trial judge was disabled during their trial. Indeed, the trial record itself discloses no evidence reasonably supporting the Bisnos' claim. Like the majority of the Ninth Circuit in *U.S. v. State of Wash.* interpreting Federal Rules of Civil

Procedure, rule 60(b)(6), we need not decide whether a permanent injunction subject to a final judgment may be vacated under Civil Code section 3424 on the grounds of the judge's mental incapacity. That determination must await a case with a compelling factual record, and focused briefing by the parties. Here, assuming the remedy sought by the Bisnos was available, the motion judge did not abuse his discretion in refusing to dissolve the permanent injunction on the ground of the trial judge's alleged inability to recall the evidence at trial.

III. *The Request for Discovery*

In conjunction with the motion to dissolve the permanent injunction, the Bisnos requested to take discovery. In particular, the Bisnos' attorney wished to depose the trial judge's wife to learn her observations of the trial judge's mental state and to determine the identity of the judge's treating physicians. He also wished to obtain the judge's mental health records. The motion judge denied the requested discovery.

In contending that the motion judge erred, the Bisnos rely on the concurring opinion of Judge Kozinski in *U.S. v. State of Wash.*, *supra*, 98 F.3d at page 1166 (*United States*). Judge Kozinski concurred in the judgment of the majority, but on the ground that Federal Rules of Civil Procedure, rule 60(b)(6), provides no authority to vacate past judgments because of the judge's disability. Nonetheless, he stated his view that "*were* mental disability a proper basis for setting aside the judgment, plaintiffs would have made a sufficient showing" to obtain discovery "from the judge's doctors to confirm or refute speculation about the judge's competence." (98

F.3d at p. 1166 (conc. opn. of Kozinski, J.), original italics.) Judge Kozinski lamented, however, that the majority's ruling left "an open invitation to parties to rummage through the health records of judges who ruled against them five, ten, even twenty years ago, in the hope of coming up with a more compelling showing." (Id. at p. 1167.)

In the instant case, we find no reasonable basis to permit the Bisnos to depose the trial judge's wife, or to obtain his medical records. It bears repeating that even if we assume the remedy of dissolving the permanent injunction subject to a final judgment is available on the basis of the trial judge's mental infirmity, the Bisnos have made no showing to reasonably suggest that such an infirmity infected the issuance of the permanent injunction in their case. Absent such a showing, the Bisnos' request for discovery is nothing more than an attempt "to rummage through the health records of [a judge] who ruled against them ... in the hope of coming up with a more compelling showing." (*United States, supra*, 98 F.3d at p. 1167 (conc. opn. of Kozinski, J.).) We find no abuse of discretion in the motion judge's denial of discovery. (Cf. *United States, supra*, 98 F.3d at p. 1164.)

DISPOSITION

The order denying the motion to dissolve the permanent injunction is affirmed. The Association shall recover its costs on appeal.

Manella, J., and Suzukawa, J., concurred.

Footnotes below

1An order after judgment denying a motion to dissolve a permanent injunction is appealable under Code of Civil Procedure section 904.1, subdivision (a)(1) and (6). (See *Crespin v. Shewry* (2004) 125 Cal.App.4th 259, 264, fn. 3 [22 Cal. Rptr. 3d 696].)

2*North Beverly Park Homeowners Assn. v. Bisno* (June 21, 2005, B175173) [nonpub. opn.].

3All undesignated section references are to the Code of Civil Procedure.

4In *Cadenasso v. Bank of Italy* (1932) 214 Cal. 562 [6 P.2d 944], the California Supreme Court entertained a separate action in equity to set aside a nonfinal judgment based on the trial judge's conflict of interest (stock ownership in the bank which had prevailed as plaintiff in the earlier case). The court expressly declined to express an opinion on whether the action could have been brought had the judgment been final. (*Id.* at p. 569.) Relying on its earlier decision in *Lindsay-Strathmore I. Dist. v. Superior Ct.* (1920) 182 Cal. 315, 332 [187 P. 1056], the court held only that "the plain inference from [*Lindsay-Strathmore*] is that objection to ... the trial judge by reason of his interest in the subject matter of the suit may be made at any time before the judgment becomes final." (*Cadenasso, supra*, 214 Cal. at p. 569.) Other California decisions have similarly considered attempts to disqualify the trial judge and vacate nonfinal judgments. (See *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 637–638, 656–659 [49 Cal. Rptr. 2d 620] [separate action, filed while underlying judgment was on appeal, to vacate the judgment on the ground that the judge was disqualified for bias; action dismissed under Code

Civ. Proc., § 425.16 as SLAPP (strategic lawsuit against public participation) suit]; *Urias, supra*, 234 Cal.App.3d at pp. 419–426 [statement of disqualification under § 170.1, filed after entry of summary judgment, seeking to vacate judgment based on judge's prior representation of defendant; disqualification of judge, and vacating of judgment, affirmed]; *Valvo v. University of Southern California* (1977) 67 Cal.App.3d 887, 890 [136 Cal. Rptr. 865] [motion to vacate judgment during pendency of appeal on the ground the trial judge had financial interest in case and was biased; denial affirmed in the absence of facts showing the judge was disqualified]; *Tatum v. Southern Pacific Co.* (1967) 250 Cal.App.2d 40, 40–43 [58 Cal. Rptr. 238] [motion to vacate judgment after trial judge disclosed stock ownership in defendant railroad; disqualification of judge, and vacating of judgment, affirmed]; *Muller v. Muller* (1965) 235 Cal.App.2d 341, 342–346 [45 Cal. Rptr. 182] [motion to vacate default judgment on the ground the judge previously represented an unrelated party in prior litigation involving parties to the present suit; denial of motion affirmed for, inter alia, failure to establish the disqualification and failure to raise the issue at earliest practicable opportunity]; *Wickoff v. James* (1958) 159 Cal.App.2d 664, 670–671 [324 P.2d 661] [motion to vacate judgment of nonsuit on the ground the trial judge was disqualified for having once served as attorney for defendants; denial of motion to vacate affirmed for failure to allege and prove facts which clearly show such disqualification existed]; cf. *Christie v. City of El Centro, supra*, 135 Cal.App.4th at pp. 776–780 [after grant of nonsuit, but before judgment, motion for new trial and § 170.1 challenge filed based on trial judge having discussed case with another judge who had been disqualified by a § 170.6

challenge; grant of new trial affirmed]. See also Cal. Forms of Pleading and Practice (Matthew Bender 2006) § 317.35[2], p. 317-45 [noting uncertainty as to whether California law permits vacating final judgment on the ground of the judge's disqualification].)

5We have granted the Association's motion requesting that we take judicial notice of the reporter's transcript of the trial.

6Our review of the trial record shows that scores of exhibits were introduced into evidence: exhibit Nos. 4, 10–12, 14–16, 22–23, 30–32, 35–36, 46, 50, 56, 60 68–69, 70–71, 79–82, 86, 95, 99, 102, 104, 110, 113, 119, 121–123, 125–126, 135–137, 146, 151, 167, 169, 170, 172–175, 183, 185, 194, 197, 200–201, 207, 220, 221–222, 228, 244, 259, 269, 288, 323, 325, 328–329, 331–332, 334, 337–339, 345, 349, 355–360, 361–377, 379, 381–382, 500, 502–505, 506, 508, 510–511, 514–522, 525–527, 533, 536–539, 540–544, 546, 548–551, 557, 559, 562–565, 567, 572–575, 577–578, 584–585, 588–589, 590, 595–597, 601, 603, 606, 611, 613–615, 619–621, 624, 627, 633–634, 639–642, 643, 649, 651–655, 657–658, 660–712, 714, 715–716, 718, 721–729, 739, 740, 752, 765, 784–785, 787, 797, 799–804, 806–815, 817–818, 819–826, and 871. Thus, it is hardly surprising that the judge would occasionally seek assistance in clarifying which exhibits were being used at any particular time.

7The Bisnos also requested that the court take judicial notice of a news article from the Los Angeles Times, and a press release from the Commission on Judicial Performance. The trial court declined to do so, and the Bisnos wisely do not challenge that ruling on appeal.

Filed: 2/1/06
SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

NORTH BEVERLY PARK HOMEOWNERS ASSOCIATION, INC., a California non-profit corporation,
Plaintiff,

vs.

JEANNETTE A. BISNO, an individual; and DOES 1 through 25, Inclusive,
Defendants.

Case No.: BC 275041 (Consolidated with Case No. BC 288585)

[Assigned to the Michael Stern, - Dept. 62]

Complaint Filed: June 5, 2002

ORDER DENYING MOTION TO DISSOLVE PERMANENT INJUNCTION

Date: January 25, 2006

Time: 8:30 a. m.
Dept.: 62

The motion to dissolve permanent injunction of defendants ROBERT H. BISNO and JEANNETTE A. BISNO came on for hearing on January 25, 2006, in Department 62 of the above-entitled court, the

Honorable Michael Stern presiding. Denise M. Parga, Esq. and Marc E. Rohatiner, Esq. appeared on behalf of plaintiff North Beverly Park Homeowners Association, Inc. Marshall G. Mintz, Esq. and James Hicks, Esq. appeared on behalf of defendants Robert H. Bisno and Jeannene A. Bisno.

After consideration of the moving, opposing and reply papers and oral argument of counsel, the Court denied the motion.

GOOD CAUSE APPEARING THEREFOR,

IT IS THEREFORE ORDERED that the motion to dissolve the permanent injunction is denied.

Dated: February 1, 2006

Hon. Michael Stern
Judge of the Superior Court

S151324

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

NORTH BEVERLY PARK HOMEOWNERS ASSOCIATION,
Plaintiff and Respondent,

v.

JEANNETTE A. BISNO et al.,
Defendants and Appellants.

May 16, 2007, Filed

OPINION

The petition for review is denied.

The request for an order directing depublication of the opinion is denied.

Ronald George
Chief Justice

Filed: 3/25/2007

IN THE COURT OF APPEAL OF CALIFORNIA,
SECOND APPELLATE DISTRICT,
DIVISION FOUR

NORTH BEVERLY PARK HOMEOWNERS ASSOCIATION,
Plaintiff and Respondent,

v.

JEANNETTE A. BISNO et al.,
Defendants and Appellants.

THE COURT:*

The court has read and considered the motion by appellants Jeanette and Robert Bisno to stay issuance of the remittitur to permit them to petition the United States Supreme Court for writ of certiorari. The court has also read and considered respondent North Beverly Park Homeowners Association's opposition. The remittitur is currently scheduled to issue on June 4, 2007. The court grants the motion to stay issuance of the reittitur for a period of 60 days, to and including August 6, 2007. Should no petition for certiorari be filed by that date, the remittitur shall immediately issue on August 7, 2007. Should a petition be filed by August 6, 2007, this stay shall remain in effect until the United States Supreme Court finally disposes of the petition. Respondent's request that appellants be required to post a bond is denied.

*WILLHITE, Acting P.J.